Supreme Court, U.S.
FILED

(1)

02 1666 MAY 12 2003

No. _____

OFFICE OF THE CLERK

In The

Supreme Court of the United States

STEVEN E. FELD,

Petitioner,

v.

PROFESSIONAL CONDUCT COMMITTEE OF THE SUPREME COURT OF NEW HAMPSHIRE,

Respondent.

On Petition For Writ Of Certiorari To The Supreme Court Of New Hampshire

PETITION FOR WRIT OF CERTIORARI

ARNOLD R. ROSENFELD
KIRKPATRICK & LOCKHART LLP
75 State Street
Boston, MA 02109
(617) 951-9125
Counsel of Record for Petitioner

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

48 pp

QUESTIONS PRESENTED

Whether the Due Process Clause of the Fourteenth Amendment was violated, due to judicial vindictiveness, when after petitioner successfully appealed his public censure, he received the harsher sanction of a one-year suspension in a second bar disciplinary ruling by the Supreme Court of New Hampshire, even though the Court relied on the same underlying facts and rule violations when imposing discipline.

Whether the Due Process Clause of the Fourteenth Amendment was violated when the Supreme Court of New Hampshire failed to grant a factual hearing to petitioner to determine what was the extent of, and the remedy for, the judicial impropriety that was the basis of the Supreme Court of New Hampshire's allowance of petitioner's successful Motion to Vacate his sanction in a bar discipline case.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
PETITION FOR WRIT OF CERTIORARI	1
OPINIONS BELOW	1
JURISDICTION	1
PROVISION INVOLVED	1
INTRODUCTION	2
STATEMENT OF THE CASE	2
REASONS FOR GRANTING THE WRIT	9
A. The Court's Second Decision Was the Result of Judicial Vindictiveness.	10
B. The Petitioner Was Entitled to a Hearing on the Judicial Impropriety Issue	13
CONCLUSION	16

TABLE OF AUTHORITIES

Page

CASES:

Aetna Life Ins. Co. v. Lavoie, 475 U.S. 813 (1986) 15

Blaisdell v. City of Rochester, 135 N.H. 589 (1992).... 14, 15

Dazzio v. F.D.I.C., 970 F.2d 71 (5th Cir. 1992) 13

Feld's Case, 815 A.2d 383 (2002) 1, 7

Feld's Case, 818 A.2d 292 (2001) 7

Feld's Case, 737 A.2d 656 (1999) 1, 4

Harline v. D.E.A., 148 F.3d 1199 (10th Cir. 1998) 14

In re Gault, 387 U.S. 1 (1967) 16

In Re Murchison, 349 U.S. 133, 136 (1955) 15

In re Proposed Rules Relating to Grievance Procedures, 115 N.H. 310 (1975) 10

In re Ruffalo, 390 U.S. 544 (1968) 10, 12

Liljeberg v. Health Servs. Acquisition Corp., 486 U.S. 847 (1988) 14

North Carolina v. Pearce, 395 U.S. 711 (1969) 9, 11, 13

Texas v. McCullough, 475 U.S. 134 (1986) 9, 11

Tumey v. Ohio, 273 U.S. 510 (1927) 15

Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio, 471 U.S. 626 (1985) 10, 12

CONSTITUTIONS:

Due Process Clause of the Fourteenth Amendment, U.S. Const. amend. XIV, § 1 .....*passim*

TABLE OF AUTHORITIES – Continued

Page

STATUTES:

28 U.S.C. § 1257(a) 1

28 U.S.C. § 455(a) 14

PETITION FOR WRIT OF CERTIORARI

Petitioner Steven E. Feld prays that certiorari issue to review the Order of the Supreme Court of New Hampshire entered December 31, 2002.

OPINIONS BELOW

The opinions of the Supreme Court of New Hampshire, dated December 31, 2002 appear at ___ N.H. ___, 815 A.2d 383 (2002), and in the Appendix hereto, at 1a-17a, and dated August 30, 1999, at 144 N.H. 131, 737 A.2d 656 (1999), and in the Appendix hereto, at 18a-27a (hereinafter cited as "App. ___.").

JURISDICTION

The Supreme Court of New Hampshire entered its most recent judgment disciplining Petitioner on December 31, 2002 (App. 1a-17a) and denied the motion for reconsideration on February 12, 2003. App. 49a-50a. This Court has jurisdiction to review that judgment under 28 U.S.C. § 1257(a).

PROVISION INVOLVED

Due Process Clause of the Fourteenth Amendment, U.S. Const. amend. XIV, § 1:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or

enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

INTRODUCTION

Petitioner, Steven E. Feld, was denied due process in his bar disciplinary proceeding in the Supreme Court of New Hampshire. After successfully appealing, on the basis of judicial impropriety, his first sanction of a public censure, the Court imposed a one-year suspension on Petitioner, without the benefit of a new hearing and explanation for the increase of his sanction. Because the Court relied on the same facts and found the same rule violations as it had when it first considered the case, the only explanation for this increase in sanction can be judicial vindictiveness. Such action, without the benefit of new facts, denied Petitioner his due process rights pursuant to the Fourteenth Amendment of the United States Constitution.

STATEMENT OF THE CASE

The underlying litigation involved a real estate dispute between Attorney Emile Bussiere ("Bussiere") and his former client, A. Roland Roberge, the New Hampshire State Banking Commissioner ("Commissioner Roberge"), Roberge's daughter, Attorney Carolyn Roberge, and two companies owned by various members of the Roberge family. Petitioner was one of the lawyers representing the

Roberge family in that litigation. Attorney Carolyn Roberge and her mother, and the two companies owned by them, had purchased a first mortgage on an apartment building in which Bussiere claimed he had a second mortgage and a lease that was strictly personal for his own use. Commissioner Roberge, although not an owner of the property, had gifted money to his wife for the purchase, and provided assistance to his daughter in the purchase process.

Petitioner commenced an eviction proceeding against Bussiere on behalf of the Roberges, and Bussiere responded by bringing an equitable proceeding against the Roberges. The litigation was complicated by Bussiere's prior representation of Commissioner Roberge and the trial court issued a protective order that prevented Bussiere from inquiring about matters relating to Bussiere's prior representation of Commissioner Roberge. During the discovery phase of the litigation, which the Judicial Referee acknowledged was "a battlefield atmosphere" and "fighting fire with fire" (App. 38a), there were answers to interrogatories, requests for admissions, and depositions. Some of the responses to the discovery requests became the basis of a complaint filed by Bussiere against Petitioner and Attorney Carolyn Roberge with the Professional Conduct Committee of the Supreme Court of New Hampshire.

A Judicial Referee held a hearing at which Attorney Carolyn Roberge and Petitioner's disciplinary charges were presented, and the Judicial Referee made a report to

the New Hampshire Supreme Court.[1] After receiving the Judicial Referee's Report and hearing oral argument, the Supreme Court of New Hampshire issued an opinion disciplining Petitioner, Steven E. Feld, for violating Rules 3.4(b), (c), and (d), and 8.4(a) of the New Hampshire Rules of Professional Conduct.[2] App. 17a-25a. In that opinion, the Court adopted the findings of fact and rulings of ethical violations recommended by the Judicial Referee, some of which exonerated Feld of some of the original allegations of misconduct and others that resulted in findings of misconduct in violation of the ethical rules. Specifically, the Court found that, at a deposition, the Petitioner had allowed his client, Commissioner Roberge, to testify to facts and circumstances the Petitioner knew to be inaccurate, and had failed to correct the record concerning his client's response to requests for admissions. The Court also adopted the mitigating factors considered by the Judicial Referee justifying the public censure. The mitigating factors adopted by the Court were: (1) the petitioner had no prior discipline; (2) he was remorseful; (3) his conduct was not intentional; and (4) he tried to correct his errors prior to the actual commencement of the trial. The Court imposed a public censure on the petitioner on August 30, 1999. App. 18a-25a.

---

[1] The Judicial Referee, Temple, J., was appointed by the Court to hear the charges. His Report, dated July 16, 1998, exonerated Attorney Carolyn Roberge and made findings of fact and rulings of law with regard to Petitioner, recommending that he receive a public reprimand. The Judicial Referee's Report appears at Appendix 28a-43a.

[2] *Feld's Case*, 144 N.H. 131, 737 A.2d 656 (1999).

In February, 2000, the Clerk of the Supreme Court of New Hampshire gave notice to Chief Justice Brock ("Chief Justice Brock") of the Supreme Court of New Hampshire of his intention to file a judicial misconduct complaint against Justice Stephen Thayer (Thayer) with the Attorney General of New Hampshire. Among the allegations the Clerk filed with the Attorney General was that Thayer had attempted to influence Petitioner's bar discipline case while it was pending before the Supreme Court of New Hampshire, even though he had recused himself from being involved in the case.[3] On March 31, 2000, the Attorney General published his specific findings that stated that when Petitioner's case was entered in the Supreme Court of New Hampshire, Thayer had recused himself from participation in the case because Bussiere, the complainant, was his longstanding friend. Despite recusing himself, Thayer spoke at the case conference and attempted to influence the outcome of the case while it was under consideration by the Supreme Court of New Hampshire. The Attorney General also reported that after Thayer tried to influence Petitioner's case, and before the opinion was issued, Thayer submitted a backdated financial disclosure form indicating that Bussiere also had loaned him $50,000. The Report of the Attorney General further alleged that Chief Justice Brock had attempted to

[3] The other allegations against Thayer involved improperly seeking to influence the selection of a panel to hear his own pending divorce case and backdating a financial disclosure statement that he received a $50,000 loan from Bussiere, one of his closest friends and the person who filed the complaint with the Professional Conduct Committee against Petitioner. Thayer also was the Court's liaison with the Professional Conduct Committee.

cover-up Thayer's misconduct in this matter and in another matter. Thayer subsequently resigned from the Supreme Court of New Hampshire in order to avoid criminal charges and the New Hampshire House of Representatives impeached Chief Justice Brock, with Article IV of the impeachment charges relating to the cover-up of Thayer's attempts to influence Petitioner's case in the Supreme Court of New Hampshire.[4] The New Hampshire Senate ultimately acquitted Chief Justice Brock by a vote of 8-14, on Article IV. Nevertheless, testimony given to the House and Senate supported the truth of the allegations of both Thayer's misconduct and Chief Justice Brock's attempted cover-up.

---

[4] In the hearing before the Judicial Referee, and in all aspects of the first Supreme Court of New Hampshire case, up to the time of the Court's first decision in August, 1999, Attorney Stephen Tober ("Tober") represented petitioner. Another justice, Justice Broderick ("Justice Broderick"), also had disqualified himself from Petitioner's case because of his relationship with Tober. When the Clerk of the Supreme Court's allegations of misconduct first surfaced in February, 2000, Chief Justice Brock and Justice Broderick sought legal advice from Tober about how to handle the allegations. Tober then represented Justice Broderick in his successful attempts to avoid impeachment and also represented Justice Broderick in his appearances as a witness at Chief Justice Brock's impeachment proceedings during which Broderick was questioned extensively about his knowledge of Thayer's attempts to influence Petitioner's case and Brock's attempts to cover-up Thayer's misconduct. When Petitioner sought to raise the issue of Tober's conflict of interest in representing a new client where he had previously represented a client (Petitioner) in a substantially related matter before the Supreme Court of New Hampshire in his Motion to vacate, (See, Judicial Referee's Recommendation on Respondent's Motion for Leave to File Motion to Vacate, and Committee's Objection Thereto (App. 44a)), the Court's Order allowing Petitioner to file a motion to vacate prohibited him from arguing the issue of Tober's conflict in his brief to the Court (App. 47a), limiting his right to argue an issue of significance in his case and thereby violating his due process rights to be heard.

After the conclusion of the impeachment proceedings, on March 9, 2001, Petitioner filed a Motion for Leave to File a Motion to Vacate his public censure. The Supreme Court of New Hampshire referred the Motion to the Judicial Referee who recommended that the Court grant the Motion because "the actions of Thayer, attempting to influence *Feld's Case*, and Chief Justice Brock's reported efforts to keep Thayer's misconduct 'in house,' place in issue whether a responsible person would question the impartiality of the Court . . ." App. 44a-45a. The Court then granted the Motion (App. 47a), and the Petitioner filed a Motion to Vacate, which the Supreme Court of New Hampshire granted in part and denied in part.[5] App. 48a. The Supreme Court denied the request for a new hearing, but vacated the August 30, 1999 Opinion. The Court only allowed the parties to file new briefs and to make a new oral argument on the Judicial Referee's first report. The briefs were filed and the Court heard oral argument on September 16, 2002.

The Supreme Court of New Hampshire issued its second opinion in *Feld's Case*[6] on December 31, 2002, this time imposing a one-year suspension on the petitioner for the exact same misconduct. In this opinion, the Court first summarily rejected Petitioner's argument of judicial impropriety on the basis that it already had refused to vacate and dismiss the case, and since there was no allegation of judicial impropriety in the Referee's original Report, they would not reconsider that issue. App. 4a. The

---

[5] *Feld's Case*, 818 A.2d 292 (2001).

[6] *Feld's Case*, __ N.H. __; 815 A.2d 383 (2002) (Appendix, pp. 1a-17a).

Court then turned to the Referee's Report and found the same misconduct that the Referee had found, rejecting Petitioner's new legal arguments that his actions did not constitute misconduct. The Court concluded that the findings of the Referee of violations of Rules 3.4 (b), (c), and (d) and 8.4(a) of the New Hampshire Rules of Professional Conduct were supported by the record.

Having found that the Petitioner had violated the same Rules of Professional Conduct on the basis of the same facts as found by the Referee, the Court next considered the appropriate sanction. Analyzing the same findings of fact and misconduct as were present in the first case, the Court now determined that Petitioner's conduct was intentional, where in the first case the Court determined that his conduct was negligent. In the second case, the Court rejected the mitigating factors found by the Referee and the Court in the first case. This time, the Court specifically disagreed with both the Referee's and its own prior decision that Petitioner's remorse should be a mitigating factor, holding instead that in cases involving dishonesty "a lawyer must admit to his professional misconduct to truly demonstrate remorse." App. 16a. The Court then imposed a one-year suspension from the practice of law on the petitioner, compared with the public censure previously imposed in the first case.

The petitioner filed a timely Motion for Reconsideration, in which he claimed, *inter alia*, that the Court's decision was a violation of his due process rights pursuant to the Fourteenth Amendment of the United States Constitution because the harsher sanction was a result of

judicial vindictiveness. The Supreme Court of New Hampshire denied this Motion on February 12, 2003. App. 49a.

REASONS FOR GRANTING THE WRIT

The importance of this case is to determine whether the principles that this Court has articulated, in *North Carolina v. Pearce,* 395 U.S. 711, 724 (1969), and *Texas v. McCullough*, 475 U.S. 134 (1986), that judicial vindictiveness after a successful appeal violates the due process clause of the Fourteenth Amendment, apply to a lawyer in a bar disciplinary proceeding.

After a hearing before a Judicial Referee, who made findings of fact, rulings of law, and a recommendation for discipline, the New Hampshire Supreme Court publicly censured the petitioner on August 30, 1999. As a result of allegations of judicial misconduct in his case, as well as in another case, by a Justice of the New Hampshire Supreme Court that surfaced publicly in March, 2000, Petitioner moved to vacate his public censure. The Supreme Court of New Hampshire allowed his motion only to the extent of permitting new oral argument before the Court. The Court denied the petitioner the right to a new hearing on the issue of judicial impropriety, his lawyer's violation of the ethical rules, and the allegations of his own misconduct.

In its second deliberation of the petitioner's case, the Court considered the same findings of fact, rulings of law, and recommendation for discipline by the judicial referee. This time, however, when it issued its opinion, the Court contradicted its earlier determination and increased the sanction, imposing a one-year suspension.

Except for the facts that the scandal in the New Hampshire Supreme Court had become public knowledge, that one justice had resigned for his misconduct, that the Chief Justice had been impeached but not convicted, and that the Supreme Court of New Hampshire had been publicly humiliated, *nothing had changed*. However, the judicial impropriety and the cover-up of that impropriety in Petitioner's disciplinary proceeding played a significant role in that scandal. Petitioner's Motion to Vacate once again raised the public specter of the scandal in the Supreme Court of New Hampshire and the ensuing stain on its reputation. The only logical reason for the Court imposing more severe discipline in the Petitioner's case, when it was decided the second time, is judicial vindictiveness for raising the issue of judicial misconduct and the New Hampshire Supreme Court scandal as the basis for the appeal. This action by the Supreme Court of New Hampshire violates Petitioner's right to due process of law.

A. The Court's Second Decision Was the Result of Judicial Vindictiveness.

This Court consistently has held that bar disciplinary proceedings and the grievance procedure against lawyers must meet the requirements of due process. *In re Ruffalo*, 390 U.S. 544, 554-56 (1968) (White, J., concurring); *Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio*, 471 U.S. 626, 654 (1985). The New Hampshire Rules also provide for due process protection. *See In re Proposed Rules Relating to Grievance Procedures*, 115 N.H. 310, 312 (1975) ("In the event of an appeal from a reprimand or in the event of a formal complaint to this court, rule 15 (new rule 14) provides the respondent-attorney with complete due process protection").

This Court consistently has held that due process requires that a person's right to appeal must be "free and unfettered" and a court is without right to put a price on appeal. *North Carolina v. Pearce*, 395 U.S. 711, 724 (1969) (internal quotation marks omitted). The Court in *Pearce* held that:

> Due process of law, then, requires that vindictiveness against a defendant for having successfully attacked his first conviction must play no part in the sentence he receives after a new trial. And since the fear of such vindictiveness may unconstitutionally deter a defendant's exercise of the right to appeal or collaterally attack his first conviction, due process also requires that a defendant be freed of apprehension of such a retaliatory motivation on the part of the sentencing judge.
>
> In order to assure the absence of such a motivation, we have concluded that whenever a judge imposes a more severe sentence upon a defendant after a new trial, the reasons for his doing so must affirmatively appear.

Id. at 725-26 (footnote omitted).

In *Texas v. McCullough*, 475 U.S. 134 (1986), this Court held that a defendant's due process rights had not been violated, despite the second and longer sentence, because the trial judge entered findings of fact justifying that longer sentence. *Id.* at 138, 143-44. There, the judge acknowledged that two new witnesses testified at the defendant's second trial and presented compelling reasons for a harsher sentence. *Id.* at 143. This Court noted that the trial judge gave a "careful explanation . . . for the [higher] sentence imposed." *Id.*

The present case is a bar disciplinary matter rather than a criminal case. Nevertheless, a lawyer who is prosecuted in a bar disciplinary proceeding is entitled to due process no different from a criminal defendant. *See Ruffalo*, 390 U.S. at 554-56; *Zauderer*, 471 U.S. at 654. Here, however, the Supreme Court of New Hampshire not only found no new facts and provided no explanation whatsoever for the imposition of a harsher sanction, it also deprived Petitioner of a hearing on the issue of judicial impropriety. In doing so, it deprived him of his right to due process guaranteed by the Fourteenth Amendment to the United States Constitution.

By providing no new facts and no explanation for the imposition of a harsher sanction while relying on the same facts and the same rule violations as the Court did in its first opinion, the Supreme Court of New Hampshire violated Petitioner's due process rights. Its justifications for the imposition of a one-year sanction were that Petitioner had a dishonest motive and was not remorseful. In the first opinion, however, the Court characterized the petitioner as being remorseful and without dishonest motive. The only possible explanation for the new conclusion is judicial vindictiveness; the Court harbored resentment towards the petitioner (who unfortunately and through no fault of his own was linked to the scandal in the Court) for bringing an appeal based upon the improper actions of a justice of that Court in the same scandal at the Supreme Court of New Hampshire, and in the same Court where his case had been decided. Furthermore, without any new evidence or information, the Court rejected the Referee's finding and the prior decision's acceptance of that finding that the petitioner "made good faith efforts to correct any inaccuracy." Such a contradiction, without

reasonable or non-vindictive explanation, should not be allowed to stand because it violates both due process and public policy. Thus, it is a violation of due process, no different from that in *North Carolina v. Pearce*, *supra*, to impose more severe discipline upon a lawyer who succeeded in having his original disciplinary case vacated, because of judicial misconduct, if it is for that reason that he successfully pursued a right to appeal.

The Court's imposition of increased discipline is an unfair use of the great power given to a court to determine discipline, and places a lawyer who seeks to pursue an appeal in the dilemma of making a choice between either attacking his discipline free of apprehension, or with the fear that the imposition of discipline may be greater. *Cf.*, *Pearce*, 395 U.S. at 724. The resulting fear of vindictiveness may unconstitutionally deter the right of appeal or collateral attack. *Id.* The due process rights of the petitioner have been violated. This is especially true when, as here, "no sound evidentiary explanation" is given to justify the harsher penalty. *See Dazzio v. F.D.I.C.*, 970 F.2d 71, 79 (5th Cir. 1992) (quoting *North Carolina v. Pearce* and stating that this "looks to us uncomfortably like judicial vindictiveness, or 'charging for the use of the courthouse.'").

B. The Petitioner Was Entitled to a Hearing on the Judicial Impropriety Issue

The Petitioner was entitled to a hearing on the issue of whether attempted improper judicial influence so contaminated the imposition of bar discipline on him that his due process rights were irreparably harmed. New Hampshire case law requires that a court's ruling cannot

stand when judicial standards have been violated. *Blaisdell v. City of Rochester*, 135 N.H. 589 (1992). While the Supreme Court of New Hampshire vacated the original sanction in the Petitioner's case, it did not allow Petitioner a new hearing to enable him to call witnesses and present evidence as to the effect of the judicial impropriety on his case. In *Liljeberg v. Health Servs. Acquisition Corp.*, 486 U.S. 847 (1988), this Court considered the effect of the failure of a federal judge to recuse himself in violation of 28 U.S.C. § 455(a). In that case, the respondent moved, pursuant to Federal Rule of Civil Procedure 60(b)(6), to vacate the judgment on the ground that the judge was disqualified under § 455(a). The judge denied the motion and the respondent appealed to the Court of Appeals, which determined that resolution of the motion required factual findings concerning the extent and timing of the judge's knowledge of the matter. This Court relied on these factual findings in its determination as to what was the proper remedy where there was a violation of § 455(a). Despite the fact that there was no evidence of harm, this Court upheld vacating the underlying decision in order to obviate the appearance of impropriety.

Here, the Supreme Court of New Hampshire, because of its bias against the petitioner for appealing its prior decision, refused such a factual hearing. Furthermore, without consideration of findings of facts that would have been produced at a hearing, it summarily denied the petitioner's argument on the issue of the effects of judicial impropriety. To state a due process claim for judicial bias, "a plaintiff must sufficiently allege facts supporting a conclusion that the risk of unfairness is intolerably high under the circumstances of the particular case." *Harline v. D.E.A.*, 148 F.3d 1199, 1204 (10th Cir. 1998). In this case,

the Judicial Referee's Recommendation on Respondent's Motion for Leave to file Motion to Vacate and Committee's Objection thereto concluded that:

> Inasmuch as the actions of Thayer, attempting to influence Feld's Case, and Chief Justice Brock's reported efforts to keep Thayer's misconduct "in house," places in issue whether a responsible person would question the impartiality of the Court, it appears appropriate to allow the respondent Leave to file a motion to vacate to allow determination of this issue as raised and as limited by the present motion seeking leave to file.

App. 44a-45a.

Petitioner was entitled to a hearing to determine whether Justice Thayer's attempted intervention in his disciplinary case resulted in bias or prejudice against him. In *Tumey v. Ohio*, 273 U.S. 510, 523 (1927), this Court concluded that "it certainly violates the Fourteenth Amendment . . . to subject [a person's] liberty or property to the judgment of a court the judge of which has a direct, personal, substantial, pecuniary interest in reaching a conclusion against him in his case." Petitioner was entitled to a determination as to whether Justice Thayer's attempted intervention resulted in a violation of the test of judicial impropriety in New Hampshire. The test is whether responsible people would question the impartiality of the Supreme Court of New Hampshire. *Blaisdell*, 135 N.H. 589; *compare*, *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813 (1986) (where this Court held that a Justice of the Supreme Court of Alabama's participation in a case violated the appellant's due process rights even though there may have been no actual bias, because "justice must satisfy the appearance of justice," citing *In Re Murchison*,

349 U.S. 133, 136 (1955)). By its failure to order a new hearing or allow the petitioner to call witnesses and present evidence, the Supreme Court of New Hampshire thereby deprived the petitioner of his right to due process.

CONCLUSION

"Due process of law is the primary and indispensable foundation of individual freedom. It is the basis and essential term in the social compact which defines the rights of the individual and delimits the powers which the state may exercise." *In re Gault*, 387 U.S. 1, 19-20 (1967). In Petitioner's case, the Due Process Clause of the Fourteenth Amendment was violated in numerous ways: (1) when the Supreme Court of New Hampshire imposed a harsher sanction on the petitioner after he had appealed and with no new evidence of misconduct or rule violations; (2) when the Supreme Court of New Hampshire denied him his right to a hearing on the effects of the judicial impropriety in his case; and (3) when the Supreme Court of New Hampshire prohibited him from even raising the issue of the effects of his previous lawyer's ethical violations on his case. These actions represent a pattern of denial of due process. There is no logical reason for the Court's action of increasing his sanction other than

judicial vindictiveness. For the foregoing reasons, this Court should grant the petition for certiorari.

Respectfully submitted,

Steven E. Feld

By: ARNOLD R. ROSENFELD
KIRKPATRICK & LOCKHART LLP
75 State Street
Boston, MA 02109
(617) 951-9125
Counsel for Petitioner

Dated: May 12, 2003

815 A.2d 383

Supreme Court of New Hampshire.

FELD'S CASE

No. LD-97-009.

Argued Sept. 19, 2002.
Issued Dec. 31, 2002.
Rehearing Denied Feb. 12, 2003.

Griffith & Associates, PLLC, of Wilton (John P. Griffith, on the brief and orally), for the committee on professional conduct.

Kirkpatrick & Lockhart, of Boston (Arnold R. Rosenfeld and John M. Edwards on the brief, and Mr. Rosenfeld orally), for the respondent.

DUGGAN, J.

On June 19, 1997, the Supreme Court Committee on Professional Conduct (committee) filed a petition with this court requesting that the respondent, Steven E. Feld, be disbarred from the practice of law. On September 3, 1997, we referred the petition to a Judicial Referee (*Temple*, J.) to conduct a hearing on the alleged violations. The referee found that the respondent violated New Hampshire Rules of Professional Conduct 3.4 and 8.4(a) and recommended a public reprimand.

The underlying litigation in this matter was the subject of our opinion in *Bussiere v. Roberge,* 142 N.H. 905, 714 A.2d 894 (1998). The relevant facts are as follows. In 1974, Emile Bussiere and several partners completed construction of a 76-unit apartment building in Manchester. In 1984, Bussiere sold the building to Stephen Bronstein, who financed the purchase with a bank loan secured

by a mortgage. Under the terms of the purchase, Bussiere and an associate retained a "paid-up" leasehold in a two-story apartment in the building, in contemplation that the building would be converted into condominiums. A series of documents, including the bank's recorded mortgage and several unrecorded letters, indicated that the bank's mortgage was subject to the leases of Bussiere and his associate even in the event of a default on the mortgage. We eventually affirmed a ruling by the superior court that these documents gave Bussiere "the right to exclusive possession and control" of the apartment against all holders of the mortgage. *Bussiere,* 142 N.H. at 906, 714 A.2d 894.

In December of 1993, Bronstein defaulted on the bank's loan. Some time afterwards, members of the Roberge family became interested in purchasing the mortgage. Carolyn Roberge (Ms. Roberge) retained the services of the respondent, Steven Feld, to complete title work and analyze the property interest held by Bussiere and his partner. On July 18, 1994, Ms. Roberge signed an option agreement with the bank to purchase the mortgage.

Bussiere became aware of the Roberges' interest in the property. On July 28, 1994, Bussiere faxed a letter (the July 28 letter) to Ms. Roberge describing his claim to the property and enclosed the unrecorded documents relating to his lease. Ms. Roberge subsequently showed this letter to Feld. Bussiere never received a reply from either Ms. Roberge or Feld. Bussiere sent a second letter to the Roberges on September 1 in which he repeated his claims and alluded to the unrecorded documents, although he did not enclose them. Despite these letters, Ms. Roberge and her mother, by means of a newly-formed corporation

(Fifty-Five Associates) of which they were the only directors, purchased the mortgage on September 7, 1994. Ms. Roberge's father, Roland Roberge (Mr. Roberge), had no role in the corporation, but gave a "substantial" amount of money to his wife to be used for the purchase and assisted Ms. Roberge throughout the transaction.

In 1995, Feld commenced eviction proceedings against Bussiere. Bussiere responded with an equity action in superior court, naming Ms. Roberge and her father Roland Roberge, among others, as defendants. During the discovery process, Bussiere, under the authority of Superior Court Rule 35(a), directed a series of depositions, interrogatories and requests for admission to the Roberges. Bussiere's inquiries concerned two major topics: (1) the financial involvement of each defendant, particularly Mr. Roberge, in the purchase of the real estate; and (2) the defendants' knowledge of Bussiere's claim prior to the purchase, particularly regarding their receipt of his July 28 letter with its attachments. Feld represented all of the defendants throughout the discovery phase, and drafted or reviewed all of their responses to interrogatories and requests for admission. The responses to these discovery requests later became the basis of the professional conduct complaint filed by Bussiere against Feld.

The committee investigated the allegations in the complaint, held an evidentiary hearing, and found that Feld "orchestrated, assisted, counseled and tolerated the formulation of inaccurate and incomplete sworn responses that he knew were inaccurate" in violation of New Hampshire Rules of Professional Conduct 3.4 and 8.4. We appointed a Judicial Referee (*Temple*, J.), who conducted a *de novo* evidentiary hearing and ruled that Feld's conduct violated Rules 3.4 and 8.4. In *Feld's Case,* 144 N.H. 131,

737 A.2d 656 (1999), we adopted the referee's findings and recommended sanction.

After the publication of that decision, it was alleged that a former justice of this court who was recused from the case improperly offered his opinions regarding the sanction imposed. The respondent, citing these allegations, petitioned this court to vacate both the opinion of this court and the referee's report. On December 4, 2001, we issued an order that granted the respondent's motion to vacate our opinion, denied his motion to vacate the referee's report and requested that the parties submit new briefs for a new oral argument before a new panel of judges.

The respondent raises two issues before us. First, he argues that the allegations of judicial impropriety demand an outright dismissal of the complaint against him. Second, he argues that his conduct during discovery did not constitute a violation of Rules 3.4 and 8.4. We address each issue in turn.

The respondent first argues that the allegations of judicial impropriety require dismissal of his case on due process grounds. He argues that "the case has been irreparably tainted" by allegations of impropriety and that a "public perception of partiality permeates the proceeding." This is essentially the same argument the respondent advanced in his motion to vacate our earlier decision. We have already considered this matter by means of our December 4, 2001 order. Given that there is no allegation of judicial impropriety regarding the referee's report, and that none of the Justices involved in the first decision are sitting on this case, we decline to reconsider our order.

We thus turn to the merits of this case. Rule 3.4 of the New Hampshire Rules of Professional Conduct states, in pertinent part:

> *Rule 3.4: Fairness to Opposing Party and Counsel*
>
> A lawyer shall not:
>
> . . . .
>
> (b) falsify evidence, counsel or assist a witness to testify falsely, or offer an inducement to a witness that is prohibited by law;
>
> (c) knowingly disobey an obligation under the rules of a tribunal except for an open refusal based on an assertion that no valid obligation exists;
>
> (d) in pretrial procedure, make a frivolous discovery request or fail to make reasonably diligent effort to comply with a legally proper discovery request by an opposing party.

The judicial referee, citing three particular incidents during the discovery process, found that Feld's actions violated Rules 3.4(b), 3.4(c) and 3.4(d). Our standard of review for the referee's factual findings in a lawyer discipline case is whether "a reasonable person could have reached the same decision as the referee." *Cohen's Case,* 143 N.H. 169, 171, 723 A.2d 937 (1998) (quotation omitted). However, we review de novo to determine whether the referee committed errors of law. *Cf. Lake Sunapee Protective Assoc. v. N.H. Wetlands Bd.,* 133 N.H. 98, 106, 574 A.2d 1368 (1990); 5 R. Wiebusch, *New Hampshire Practice, Civil Practice and Procedure* § 39.10, at 240 (2d ed.1998).

At the outset, we note that the judicial referee throughout his report described Feld's violations as a

"failure to correct the record" regarding the statements made by his clients. Feld argues that because New Hampshire has not adopted Model Rule of Professional Conduct 3.3(a)(2), which imposes a duty to disclose facts to a tribunal in order "to avoid assisting a criminal or fraudulent act by the client," he has not violated the Rules of Professional Conduct in the manner described by the referee. *See N.H. R. Prof. Conduct* 3.3 New Hampshire Comments. Despite the referee's choice of words, however, we hold that the incidents detailed in the report clearly involve the explicit text of Rule 3.4. Thus, we need not reach the issue of whether Feld had a subsequent duty to correct the record.

The first incident occurred in response to Bussiere's November 6, 1995 request for admissions. Bussiere requested that Carolyn Roberge admit that certain documents, including his July 28 letter and the attached unrecorded mortgage letters, were complete and genuine. The response, reviewed by Feld, claimed that the letter "was never received by Carolyn M. Roberge." Feld, however, knew that this answer was false when he signed it, as Ms. Roberge had already shown Feld the July 28 letter along with the unrecorded documents.

The respondent claims that this response was a mistake. This claim, however, is belied by the fact that Feld provided other false answers regarding the July 28 letter. In response to a September 1995 interrogatory question in which Bussiere asked Ms. Roberge if she admitted the existence of his lease, Feld assisted in drafting the following response:

> No. See Memorandum of Law previously filed with the Court. A copy of Bussiere's lease was provided with the mortgage documents. Bussiere

> personally wrote that there were other documents prior to the closing of the sale on the mortgage. *None were ever provided. These are the sole documents that are known.*
>
> (Emphasis added.)

Carolyn Roberge also provided numerous evasive answers regarding the July 28 letter during her deposition on October 11, 1995, at which Feld was present. Given the importance placed by Bussiere upon this line of inquiry, and Feld's repeated involvement with false answers, the record does not support Feld's claim that his assistance with the response to the request for admission was inadvertent.

The respondent also argues that the answer did not prejudice Bussiere because "[t]he Roberges never denied they had received notice" of his claim. We have never held that lack of prejudice to an opposing party is a defense to a violation involving deceit upon the court or an opposing party. In *Kalil's Case,* 146 N.H. 466, 466-67, 773 A.2d 647 (2001), for example, we sanctioned a lawyer for lying to a court, even though his misstatement was corrected almost immediately and did not concern the material facts or issues of the litigation.

In any event, Bussiere's request for admission to Ms. Roberge did not ask generally whether the Roberges had notice of his claim, but specifically asked whether they had received his July 28 letter with its attached documents. Despite numerous attempts throughout the discovery process, Bussiere never received this confirmation. We thus agree with the referee that Feld violated Rule 3.4(b) by assisting his client in providing false testimony. In impeding Bussiere's interrogatory, Feld violated Superior

Court Rule 35(b)(1), which entitles parties to all relevant, unprivileged information that they request during discovery. Feld thus also violated New Hampshire Rules of Professional Conduct 3.4(c) (prohibiting a lawyer from violating a rule of a tribunal) and 3.4(d) (failing "to make a reasonably diligent effort to comply with a legally proper discovery request"). *See also Mississippi Bar v. Land,* 653 So.2d 899, 909 (Miss.1994).

The second incident involves Roland Roberge's December 13, 1995 supplemental answers in response to a Bussiere interrogatory. Bussiere asked twenty-three questions relating to the purchase of the building, the roles of the defendants, Bussiere's lease, and the circumstances of his eviction. One question specifically asked Mr. Roberge to "[s]tate in full detail how each or any of the defendants obtained the financing to purchase the mortgage on the subject property." Feld reviewed and sent the following response to all twenty-three questions:

> As previously stated in my deposition and interrogatories I am neither an officer, director, employee, creditor, debtor, shareholder, "agent" or "owner" of either Fifty Five Associates, LTD. or H.T. Management Corporation. To the best of my knowledge all of the records are in the custody of my daughter at her business office in Portsmouth, New Hampshire. I do not possess, maintain, or have access to the corporate or financial books or records of either business. I have never personally seen the checkbook or business ledgers of either corporation. *I have no further personal knowledge not learned through my legal counsel.*
>
> (Emphasis added.)

When he reviewed this response, Feld knew at the very least that Mr. Roberge had transferred a large sum of money to his wife, the director of the purchasing corporation, for the purpose of buying the real estate. Thus, Feld knew when he drafted the responses that a disclaimer of any "personal knowledge" on the part of Mr. Roberge was false.

The respondent argues, however, that Feld cannot be held liable because the attorney general has decided not to prosecute Mr. Roberge for perjury. We disagree. First, perjury requires that a statement be "material" in addition to being false. *See* RSA 641:1(a) (1996). Rule 3.4(b) contains no materiality requirement. Nor do we see any reason to imply such a requirement in a discovery context, where a party has the right to acquire information that is not in and of itself material. *See* Super. Ct. R. 35(b)(1). Second, violations of Rule 3.4(d) need not involve false statements. A pattern of evasive or non-responsive conduct, such as that demonstrated in the responses to the interrogatory, demonstrates a lawyer's failure "to make reasonably diligent effort to comply with a legally proper discovery request made by an opposing party." *N.H. R. Prof. Conduct* 3.4(d); *see State ex. rel. Okl. Bar Ass'n v. Lloyd,* 787 P.2d 855, 859-60 (Okl.1990). We thus agree that Feld's assistance with Mr. Roberge's responses constituted a violation of Rules 3.4(b), 3.4(c) and 3.4(d).

The third incident concerns Feld's conduct at the deposition of Roland Roberge on October 11, 1995. Throughout the morning, Bussiere questioned Mr. Roberge repeatedly about his financial involvement with the purchase of the real estate. Mr. Roberge's answers were evasive and dilatory. The following exchange, in which Bussiere questioned Mr. Roberge, was typical:

Q: Now in the course of the transaction, sir, where that mortgage was acquired, did you speak to anyone about the terms and conditions of that acquisition?

A: I was aware that my daughter was interested in this mortgage in possession.

Mr. Bussiere: Would you kindly reread the question and see if we can get an answer?

The Witness: Can you also reread the answer? (Whereupon, the previous question was read back by the reporter.)

Q: Do you understand the question, sir?

A: Yes, I do, sir.

Q: Would you answer it, please?

A: I was not a purchaser. I don't have any financial interest in acquiring the mortgage; I was not proposed to be an employee or a director or an officer and I like any normal father, I am interested in the things that my daughter does.

Mr. Bussiere: Would you reread the question? (Whereupon, the previous question and answer were read back by the reporter.)

Q: Do you understand the question?

A: Yes, I do.

Q: Would you answer it, please?

A: I entered into no negotiations whatsoever on behalf of my daughter. I was not authorized to do so by her. My function is strictly that of a dad, a proud father. I have no legal ownership. I have no interest in making any investments in real

estate. I am not an officer, director, trustee, or anything else here.

Mr. Bussiere: Would you read the question back please? (Whereupon, the requested question was read back by the reporter.)

Q: Would you please answer the question?

A: I do not have, nor have I ever had the authority to discuss or negotiate the purchase of a mortgage for my daughter because I am not, I have just not been authorized to do that. I am not an employee of one of her corporations or a director, an officer; and I am not authorized to negotiate anything on her behalf.

Mr. Bussiere: Mr. Hayward, would you indicate that this is the fourth reading of the question and read it back, please? (Whereupon, the requested question was read back by the reporter.)

Q: Would you please answer the question?

A: I am not an officer, director, trustee of any of my daughter's corporations. I am not authorized to negotiate on her behalf nor have I ever been. Wait a minute. I will take that back. Nor have I been in this transaction that you referred to here today.

Q: Now Mr. Roberge, I have had the question read five times and we can do that another five times, but it appears as if you do not want to tell me whether or not you did or did not, or whether or not you have forgotten whether you have discussed the terms and conditions of that acquisition with any human being. Are you willing to answer that question or unwilling?

A: With any human being? My daughter. A new nuance to that question has been brought in, the term with any human being.

Q: Well, we will strike that term and say with anyone. We will use anyone for that question.

A: With anyone?

Q: I can have the question reread for you, but I am satisfied, Mr. Roberge, if you just don't want to answer the question and we will move on to something else.

A: I never said that.

Q: Then I suggest we reread the question.

A: I can't tell you.

Q: Wait a minute. I am suggesting that we reread the question one more time. Mr. Hayward, would you please oblige? (Whereupon, the requested question was read back by the reporter.)

The Witness: Yes, I spoke to my daughter.

During the lunch break, Mr. Roberge told Feld that he had transferred a substantial amount of money to his wife, a director of the purchasing corporation, to buy the real estate. After the deposition resumed, Bussiere specifically asked whether Mr. Roberge gave any money to Carolyn Roberge or the corporation involved in the purchase. Feld objected, stating that the information was protected by the attorney-client privilege, and Mr. Roberge did not answer the question.

The respondent argues that a protective order based upon Bussiere's prior representation of Mr. Roberge

provided him with a reasonable basis to invoke the attorney-client privilege. The referee, however, found that the objection "obviously went beyond any court-ordered protection arising out of an earlier representation." A review of the record supports the referee's finding. The witnesses at the hearing provided different accounts of what financial information, if any, Mr. Roberge had provided to Bussiere. All agreed, however, that the prior representation involving this alleged disclosure occurred in the early 1980s. Moreover, neither Feld nor Mr. Roberge demonstrated how the financial information allegedly given to Bussiere was privileged or explained the relationship between the prior representation and the current litigation. These facts demonstrate that Feld's invocation of the privilege was not legitimate, but rather a bad faith effort to impede Bussiere's discovery. Such conduct violates not only Rule 3.4(d), but also Rule 3.4(c), which requires a lawyer to obey the rules of a tribunal, including Superior Court Rule 35(b)(1), which requires compliance with legitimate discovery requests.

Our ruling that Feld has violated Rules 3.4(b), 3.4(c) and 3.4(d) also leads us to find a violation of Rule 8.4(a) (professional misconduct for an attorney to "violate or attempt to violate the Rules of Professional Conduct"). *See Farley's Case,* 147 N.H. 476, 476-77, 794 A.2d 116 (2002).

Having found that Feld violated the Rules of Professional Conduct, we next consider the appropriate sanction. Lawyer discipline is not intended to be punishment. *Welts' Case,* 136 N.H. 588, 592, 620 A.2d 1017 (1993). Rather, "[t]he purpose of this court's disciplinary power is to protect the public, maintain public confidence in the bar, preserve the integrity of the legal profession, and prevent similar conduct in the future." *Cohen's Case,* 143 N.H. at

171-72, 723 A.2d 937 (quotation omitted). When deciding the sanction, we consider both the severity of the misconduct and mitigating circumstances. *See Nardi's Case,* 142 N.H. 602, 606, 705 A.2d 1199 (1998). Although we defer to the referee's factual findings, "we retain the ultimate authority to determine the appropriate sanction for a violation of the Rules." *Cox's Case,* 148 N.H. ___, ___, 813 A.2d 429 (2002).

"Although we have not adopted the *ABA Standards for Imposing Lawyer Sanctions*, we look to them for guidance." Id. at ___, 813 A.2d at 434. According to the relevant ABA Standard, "[S]uspension is appropriate when a lawyer knowingly violates a court order or rule, and there is injury or potential injury to a client or party, or interference or potential interference with a legal proceeding." *ABA Standards for Imposing Lawyer Sanctions* § 6.22 (1991). Reprimand is generally appropriate only when the conduct was negligent. *Id.* § 6.23. In this case, the record clearly establishes that Feld's multiple violations of Rule 3.4 were intentional, and that they caused potential, if not actual, injury to Bussiere's lawful pursuit of information during the discovery process. Feld's conduct, moreover, involved making false statements. We have held that "no single transgression reflects more negatively on the legal profession than a lie." *Nardi's Case,* 142 N.H. at 606, 705 A.2d 1199 (quotation omitted). We also note that Feld's misconduct was not related to a single incident, but involved separate ethical violations involving different clients occurring over a period of several months.

In recommending a sanction of reprimand instead of suspension, the referee found five mitigating factors. The first of these factors, the absence of a prior disciplinary record, was indisputably present. However, the PCC

contests the referee's finding of four other factors, to wit: (1) Feld's cooperation with the PCC; (2) the absence of a dishonest motive; (3) Feld's good faith efforts to remedy the effects of his misconduct; and (4) Feld's remorse for his actions. *Cf. ABA Standards* § 9.32. We consider the evidence and weight of each of these factors in turn.

First, the referee noted that Feld "cooperated with the professional conduct committee throughout its proceedings." After reviewing the record, we agree that Feld cooperated by responding to the PCC's inquiries and attending hearings, even though he did not admit to violating the rules. *Cf. Clark's Case,* 136 N.H. 497, 499, 619 A.2d 220 (1992) (respondent "failed to appropriately respond" to the committee's complaint). Because a lawyer has a professional duty to cooperate with a PCC investigation, however, we do not ascribe significant weight to this factor. *See* id. at 499, 619 A.2d 220.

Second, the referee found that "no dishonest motive has been shown" for Feld's conduct. We have found this factor in cases involving, for example, unintentional conduct or incompetence. *See, e.g., Farley's Case,* 147 N.H. at 476-77, 794 A.2d 116; *Welts' Case,* 136 N.H. at 590-93, 620 A.2d 1017. Intentionally assisting in the promulgation of false answers is, however, inherently dishonest. Feld's claim that he acted in his clients' interests at most demonstrates that he lacked a selfish motive, but does not make his conduct any less dishonest. *See ABA Standards* § 9.32(b) (distinguishing between dishonest and selfish motives). We thus cannot find this mitigating circumstance to be present.

We also disagree with the referee's finding that "good faith efforts were made to correct any inaccuracy." At most,

the record demonstrates that Carolyn and Roland Roberge's testimony at the first trial included the information Feld had withheld from Bussiere during discovery. A good faith remedy for misconduct, however, must be timely to be mitigating. *See Welts' Case,* 136 N.H. at 593, 620 A.2d 1017; *ABA Standards* § 9.32(d). The disclosures in this case occurred months after the initial misconduct. Moreover, the trial testimony did not correct Feld's misconduct. Bussiere was entitled to obtain the information before, not during, the trial. *See Super. Ct. R.* 35(b)(1). Feld's misconduct caused potential, if not actual, harm to Bussiere's ability to effectively prepare for trial. To correct his misconduct, Feld, at the very least, had to bring his misconduct to the attention of Bussiere or the court *before* the trial began.

Finally, we disagree with the referee's finding that Feld's remorse should be a mitigating circumstance. Feld "expressed sincere regret that he allowed himself to get caught up in the battlefield atmosphere in the litigation against Mr. Bussiere." He did not, however, admit that he violated the Rules of Professional Conduct. In cases involving dishonesty, a lawyer must admit to his professional misconduct to truly demonstrate remorse. *See, e.g., Kalil's Case,* 146 N.H. at 466-67, 773 A.2d 647. We can find no evidence that Feld has accepted responsibility for his ethical violations. We also note that the "battlefield atmosphere" alleged to exist during the litigation does not excuse Feld's misconduct. *See, e.g., Bruzga's Case,* 145 N.H. 62, 72, 753 A.2d 608 (2000).

We are aware of the significant delay involved in the final adjudication of this case. Yet because we find that most of the mitigating circumstances found by the referee are not present, we decline to impose the recommended

sanction of a public reprimand. Instead, weighing the severity of Feld's misconduct against his lack of a prior disciplinary record, his cooperation, lack of a selfish motive, and the delay, we conclude that the respondent should be suspended from the practice of law for one year. This sanction is commensurate with the discipline we have imposed in cases involving intentional deceit during litigation. *See Bruzga's Case,* 145 N.H. at 72, 753 A.2d 608 (one year suspension); *but see Basbanes' Case,* 141 N.H. 1, 8, 676 A.2d 93 (1996) (disbarment); *Jones' Case,* 137 N.H. 351, 361, 628 A.2d 254 (1993) (disbarment). We also order Feld to reimburse the committee for that portion of the costs attributable to his misconduct. We remand the allocation of costs to the referee.

The respondent is hereby suspended from the practice of law for one year. The suspension shall begin thirty days from the date of this opinion, or upon issuance of a decision based upon any motions for rehearing or reconsideration, whichever is later. He shall have the right to resume the practice of law, after the expiration of the suspension period, upon compliance with all the terms and conditions of this order and pursuant to the procedure set forth in Supreme Court Rule 37(12) regarding reinstatement. *See Sup.Ct. R.* 37(2)(j).

So ordered.

NADEAU, J., concurred; MURPHY, C.J., and SMITH, J., superior court justices, specially assigned under RSA 490:3, concurred.

737 A.2d 656

Supreme Court of New Hampshire.

In re **FELD'S** case.

No. LD-97-009.

Aug. 30, 1999.

Griffith & Associates, PLLC, of Wilton (John P. Griffith, on the brief and orally), for the committee on professional conduct.

Tober Law Offices, P.A., of Portsmouth (Stephen L. Tober and Tara C. Schoff, on the brief, and Mr. Tober orally), for the respondent, Steven E. Feld.

JOHNSON, J.

The Supreme Court Committee on Professional Conduct (committee) petitioned this court requesting that the respondent, Steven E. Feld, be disbarred from the practice of law. We appointed a Judicial Referee (*Temple*, J.) to conduct a de novo hearing on the committee's petition. The referee found, by clear and convincing evidence, that the respondent violated New Hampshire Rules of Professional Conduct (Rules) 3.4(b)-(d) and 8.4(a), and recommended a public censure and payment to the committee of a percentage of the costs of investigation. The committee now objects to the referee's recommended sanction, and Feld objects to both the findings of violations and the recommended sanction. We agree with the referee and impose the recommended sanction.

We recite the relevant facts supported by the referee's report and the record. Additional facts underlying this petition arise from the case of *Bussiere v. Roberge*, 142

N.H. 905, 714 A.2d 894 (1998). Feld's professional violations arise from his conduct in litigation involving a seventy-six-unit apartment building in Manchester. In 1984, Emile Bussiere and a partner sold the apartment building and both retained an interest in one unit each. The initial buyer of the building intended to convert the apartments into condominiums, at which time Bussiere's and his partner's respective units would be conveyed to them as condominiums. While Bussiere's leasehold interest was recorded at the registry of deeds, the parties' agreement regarding his right to full ownership upon conversion was not. Certain documents exchanged by legal counsel, the lending institution, and Bussiere, however, reflected such agreement (the 1984 unrecorded documents). The buyer never converted the property into condominiums, however, and in 1994, defaulted on the first mortgage. The mortgage lender took possession of the property, and desired to sell it.

On July 18, 1994, Carolyn Roberge signed an agreement to purchase the first mortgage. Attorney Feld was retained to represent, *inter alia*, Carolyn and her father, Roland Roberge, to provide legal advice on issues arising from the transaction. The bank sent Feld copies of the 1984 unrecorded documents on July 19, 1994. Bussiere, upon learning that Feld's clients desired to purchase the property, and unaware that the bank had provided Feld with the documents, left several phone messages with Roland Roberge to inform them of his interest. On July 21, Carolyn Roberge spoke with Bussiere on a speaker phone and informed Bussiere that Feld was present in the room; Carolyn recorded the conversation. On July 28 and September 1, 1994, Bussiere sent copies of the documents regarding his interest in the property by mail and by

facsimile transmission. Feld acknowledged receipt of the documents on September 2.

On September 7, 1994, two corporations, including Fifty-Five Associates, Ltd. (Fifty-Five), purchased the first mortgage. Carolyn, her mother, and her brother's trust owned shares in Fifty-Five, and Carolyn and her mother were the directors. In April 1995, Feld initiated eviction proceedings against Bussiere, believing that Bussiere's leasehold interest was terminable because the lease did not contain a termination date. Bussiere responded by initiating an equitable proceeding against Fifty-Five, Carolyn, and Roland in June 1995. Bussiere's discovery focused on the central questions of what did the Roberge family know regarding Bussiere's rights in the property, which members of the family knew what, and when did they know it. Bussiere also sought information on what role Roland played in arranging the purchase of the first mortgage.

During discovery, Feld's actions in the interrogatories and the deposition enabled his clients to deny Roland Roberge's involvement in the purchase arrangement and knowledge of its terms. In reality, the referee found that Roland Roberge was heavily involved in the transaction and was the only member of the Roberge family with full knowledge of the financial circumstances of the Roberge family. Feld's participation in the discovery process, during which he admits mistakes were made, along with his involvement in taping the July 21 conversation, resulted in the present disciplinary matter. At trial, Feld clarified these misperceptions, allowing the truth to come to light.

When reviewing a disciplinary matter, we address two issues.

> First, whether the record supports the findings and rulings of the referee, and second, the appropriate sanction to impose against the respondent. In reviewing the referee's findings, we determine whether a reasonable person could have reached the same decision as the referee on the basis of the evidence before him.

Doherty's Case, 142 N.H. 446, 449, 703 A.2d 261, 263 (1997) (citations and quotations omitted). Although we defer to the referee's factual findings if supported by the record, *see Wehringer's Case,* 130 N.H. 707, 716, 547 A.2d 252, 257 (1988), we retain the ultimate authority to determine whether, on the facts found, a violation of the rules governing attorney conduct has occurred and, if so, the appropriate sanction. *Wood's Case,* 137 N.H. 698, 701, 634 A.2d 1340, 1342 (1993).

The referee found that the committee had not proven by clear and convincing evidence that Feld violated Rule 8.4(c) by participating in the taping of the telephone conversation with Bussiere. The referee noted that the recording was made by Feld's client, and that Feld did not tape and did not participate in the taping of the speaker phone conversation. The referee found that Feld had no intention to create evidence or establish an advantage in litigation. Further, the referee found that Feld advised his client, perhaps erroneously, based on previous research in another matter, that taping a speaker phone conversation did not violate State law. *See* RSA ch. 570-A (1986 & Supp.1998) (amended 1998). The referee found that the committee did not establish by clear and convincing evidence that Feld's conduct involved dishonesty, fraud, deceit, or misrepresentation, involving the recording of the speaker phone conversation, or that Feld had an improper

intent when he was present during the recording. In the context of this case, we accept the referee's findings that no violation occurred in recording the speaker phone conversation.

We conclude that the record supports the referee's finding that Feld's conduct during the discovery process violated Rules 3.4(b)-(d) and 8.4(a). First, the referee found that in the course of Roland Roberge's deposition, "Feld watched and listened to his clients (Roberge) testify to facts and circumstances that he knew to be inaccurate." (Quotation omitted.) Feld's actions in Roland's deposition and ensuing interrogatories permitted his clients to give nonresponsive answers.

The record aptly supports the referee's finding that when Bussiere sought information during Roland's deposition relating to his financial involvement in the transaction, Feld prevented his client from answering by making objections that "went beyond any court-ordered protection arising out of an earlier representation [of] Mr. Roberge by Attorney Bussiere." While Feld may not have learned the full extent of Roland's financial involvement in the transaction until Roland's disclosure to Feld during the lunch recess of his deposition, and Feld testified that he then told his client to "[j]ust continue to tell the truth," Feld did not clarify Roland's earlier denials, or advise his client that a correction was necessary when the deposition resumed. *Cf. N.H. R. Prof. Conduct* 3.4(b).

Second, the record supports the referee's finding that Feld proffered a non-responsive answer in interrogatories when he responded that the requested information about Roland's financial involvement was outside Roland's

personal knowledge, an "inaccuracy [which] was allowed to persist without correction throughout the pretrial period."

Third, the record supports the referee's finding that Feld inexcusably allowed his client to deny timely receipt of the July 28 Bussiere letter with the enclosed 1984 unrecorded documents establishing Bussiere's claim to the property. Feld's failure to correct the record established violations of Rules 3.4(b)-(d) by clear and convincing evidence. Rules 3.4(b)-(d) provide that a lawyer shall not:

> (b) falsify evidence, counsel or assist a witness to testify falsely, or offer an inducement to a witness that is prohibited by law;
>
> (c) knowingly disobey an obligation under the rules of a tribunal except for an open refusal based on an assertion that no valid obligation exists;
>
> (d) in pretrial procedure, make a frivolous discovery request or fail to make reasonably diligent effort to comply with a legally proper discovery request by an opposing party.

N.H.R. Prof. Conduct 3.4(b)-(d). The referee also found that these violations further established a violation of Rule 8.4(a), which provides that professional misconduct occurs when a lawyer "violate[s] or attempt[s] to violate the Rules of Professional Conduct, knowingly assist[s] or induce[s] another to do so, or do[es] so through the acts of another." *N.H. R. Prof. Conduct* 8.4(a).

Feld argues that the evidence, "viewed in the context of the spurious litigation below," does not support a violation of the Rules. He argues that he entered into the representation in this matter without a full appreciation of the extent of the personal animosity between the parties

and the potential for fierce "war-like litigation." He contends that the evidence merely shows that he made improper objections, that "Bussiere's conduct was not above reproach," and that some of the information sought was mistakenly withheld and "collateral, if not irrelevant," to the litigation.

Because the Rules govern each attorney, *cf. N.H. R. Prof. Conduct* 5.1, 8.4(a), a client's confrontational or caustic relationship with an opposing party or attorney cannot excuse the attorney's professional misconduct, *see N.H. R. Prof. Conduct* 1.2(e). An attorney has an obligation to insure that his professional conduct complies with the limits outlined in the Rules, irrespective of a client's or an opposing party's conduct. Of course, a lawyer always has a duty to correct errors created by his client when the attorney learns of them. *See N.H. R. Prof. Conduct* 3.4(b).

The referee was apparently aware of, but not persuaded by, the parties' relationship when he made his recommendation, noting elsewhere in his report that "[b]ut for the ill will existing" between the parties, "it may be that more prompt and responsive answers would have resulted." Based on a review of the record, we cannot say that a reasonable person could not have reached the same conclusion as the referee.

Next, we consider the sanction to be imposed. "The sanction must be determined by affording appropriate weight to the severity of the violations found and to the mitigating circumstances disclosed by the record." *Doherty's Case*, 142 N.H. at 450, 703 A.2d at 264 (quotation omitted). As mitigating factors, the referee found no prior disciplinary record, an absence of a dishonest motive, and good faith efforts to correct inaccuracies during the trial so

that "the real and relevant issues were litigated." The referee also found that Feld cooperated with the committee throughout the entire investigative process. The referee recommended a public censure, along with reimbursement for the committee's expenses "in an amount recognizing that [Feld] has prevailed in part."

Feld argues that this sanction is too severe in light of the referee's finding that the parties had an acrimonious relationship that may have contributed to this incident. He also notes mitigating factors that the referee should have given greater weight in recommending a sanction, including absence of a prior disciplinary record, absence of a dishonest or selfish motive, timely good faith efforts to rectify his errors, a cooperative attitude towards the committee, good character and reputation, and remorse for his conduct. Feld buttresses his claim by relying on the referee's finding that Bussiere described his own conduct in the matter as "fighting fire with fire."

In other instances involving similar violations, attorneys have received more serious sanctions. *See, e.g., Jones' Case,* 137 N.H. 351, 361, 628 A.2d 254, 260 (1993). We are convinced that the referee considered the mitigating factors in ordering a public censure. After considering all factors presented by the committee and Feld, we conclude that a public censure in this instance will further the purposes of protecting the public, preserving the integrity of the bar, maintaining public confidence in the bar, and preventing similar instances in the future. *Cf. Welts' Case,* 136 N.H. 588, 593-94, 620 A.2d 1017, 1019-20 (1993). The absence of a prior disciplinary record and selfish motives are mitigating factors weighing against the committee's recommendation of disbarment. *Carpenito's Case,* 139 N.H. 168, 174, 651 A.2d 1, 5 (1994).

Lastly, Feld argues that we should consider Attorney Robert Varney's improper participation in the matter before the referee as a mitigating factor. Specifically, he argues that his due process rights were compromised because Varney improperly served as co-counsel for the committee in this matter before the referee after serving as the committee's investigating member and chair of the hearing panel, in violation of Supreme Court Rule 37(2)(b). That rule provides in relevant part that "'Bar Counsel' means the attorney or attorneys responsible for the prosecution of all the disciplinary proceedings before the court, the committee or any hearing panel . . . other than one of their number." Feld argues that once Varney served as the investigating member before the committee, *see Sup.Ct. R.* 37(2)(b), he was precluded from participating in the prosecution of the matter before the referee.

Even assuming that Feld's assertion is correct, we note that once notified of the situation, the referee asked Varney not to participate in the hearing process and further, Feld concedes that "there is no question that the Referee was not influenced" by Varney's participation. Accordingly, absent a demonstrable impact on the fairness of the proceedings before the referee, an allegation of a meaningful due process concern strains credibility. *See Appeal of Trotzer*, 143 N.H. 64, 68-69, 719 A.2d 584, 587-88 (1998). Feld concedes that the referee was not influenced by Varney's participation; therefore, any alleged error in this instance was harmless.

Having concluded that the record supports the referee's findings and rulings, *Drucker's Case,* 133 N.H. 326, 329, 577 A.2d 1198, 1199 (1990), we also agree that his recommended sanction of a public censure is the appropriate sanction on the facts of this case. Accordingly, we order

a public censure, and note that the conduct of Feld resulted in a substantial portion of the committee's expenses in this matter. Accordingly, we remand to the referee for an allocation of such expenses.

So ordered.

THAYER, HORTON, and BRODERICK, JJ., did not sit; BATCHELDER, J., retired, participated by special assignment under RSA 490:3; all who participated concurred.

STATE OF NEW HAMPSHIRE
SUPREME COURT

LD-97-008, In the Matter of Carolyn M. Roberge, Esq.
LD-97-009, In the Matter of Steven E. Feld, Esq.

Referee's Report

Carolyn M. Roberge:

The Supreme Court Committee on Professional Conduct (PCC) has petitioned for a six-month suspension from the practice of law of the respondent, Carolyn M. Roberge, alleging the following violations of the Rules of Professional Conduct:

a) Rule 8.4(c) by making a tape of a telephone conversation without the permission of a party to that conversation, and subsequently offering it at trial without prior notice, for the purposes of obtaining an unfair advantage against the opponent.

b) Rules 3.4(a) and 3.4(d) by giving false, unresponsive, evasive, and misleading answers to interrogatories and questions at depositions concerning the receipt of, and knowledge of, 1984 non-recorded letters and agreements.

c) Rule 3.4(b) by continually failing to correct the record when she knew that sworn trial and deposition testimony given by her father concerning his role in and what and when he knew of his daughter's and his wife's investment was inaccurate.

d) Rule 8.4(a) by violating provisions of the Rules of Professional Conduct.

The respondent Carolyn M. Roberge's answer to the petition for suspension alleges that Rule 3.4 applies only to professional conduct, and in this case she was acting

personally as a client, and/or, a landlord; so that Rule 3.4 does not apply to the circumstance presented in this case. The respondent denies any violation by her of Rule 3.4(a), (b), and (d). The respondent answers that a violation of Rule 8.4(c) has not been stated since the party recorded did not have a reasonable expectation of privacy in the circumstances of the conversation and because no unfair advantage could either be sought or obtained from the recording unless a presumption is made that the speaker (Emile Bussiere) intended to testify differently at trial than he spoke in the conversation.

Steven E. Feld:

The Supreme Court Committee on Professional Conduct (PCC) has petitioned for the disbarment of the respondent, Steven E. Feld, alleging the following violations of the Rules of Professional Conduct:

a) Rules 3.4(b), 3.4(c), 3.4(d), and 8.4(c) by engaging in conduct that reflects a calculated intention to distort the record, alleging specifically that respondent Feld orchestrated, assisted, counseled, and tolerated the formulation of inaccurate and incomplete sworn responses that he knew were inaccurate, particularly when he had played a part in the actions at issue.

b) Rule 8.4(c) by participating in the making of a tape of a telephone conversation without the permission of a party to that conversation, and subsequently offering it at trial without prior notice for the purpose of obtaining an unfair advantage against the opponent.

(c) Rule 8.4(a) by engaging in conduct that violates the Rules of Professional Conduct.

The respondent's answer to the petition for disbarment denies the allegations contained in paragraphs a, b, and c as well as denying the alleged supporting facts for such allegations.

The alleged misconduct on the part of the respondents arose out of circumstances leading to and including litigation concerning a 76-unit apartment building located at 55 North River Road in Manchester. In 1984, Emile Bussiere and partner sold their interest in the building, and when the buyer was unable to meet the full price, it was agreed that Bussiere and his partner would take a second mortgage of two million dollars and each would retain a penthouse apartment. It was the intent of the buyer to condominiumize the building and Bussiere was to retain possession of the apartment until the condominiumization under RSA 356-B took place when the apartment would be conveyed to Bussiere without additional consideration, except that Bussiere was obliged to pay utility bills and other carrying charges. The parties agreed to a pro forma "paid up" lease and the filing of a "notice of lease" of the apartment at the Registry of Deeds. Correspondence between counsel, the bank, and Bussiere acknowledged the exclusion of the apartment from the bank's collateral, and the agreement was that even foreclosure would not affect Bussiere's right to possession. Only the parties' loan agreement set forth the plan of condominiumization. The Bank's mortgage recited that it was subject to the lease of the apartment to Bussiere. Neither the lease or notice of lease made reference to rights upon condominiumization. The lease contained no termination date and the recorded notice of lease described a lease as running from "year to year." Bussiere remained in possession over the next ten

years, paying utility bills. The buyer had not condominiumized the building and in 1994 the first mortgage was in default and a bank management company, Lehman Brothers, was managing the building as mortgagee in possession, seeking to market the first mortgage. Bussiere attempted to purchase the first mortgage, but was unsuccessful.

In June 1994, the Roberge family became interested in purchasing the first mortgage on 55 North River Road and on July 18, 1994, Carolyn Roberge signed a loan sale and assignment option agreement to purchase the mortgage. Carolyn retained Steven Feld to advise her about legal issues, but he was not involved in the financial arrangements for the purchase of the first mortgage. The bank's counsel, under terms of a confidentiality agreement, provided Feld with his legal analysis of the 1984 unrecorded documents exchanged by Bussiere, the bank, and counsel along with enclosure of the documents. These materials were reviewed and discussed with Carolyn by Feld. By these disclosures, they had been apprised of the extent of Bussiere's claims. During this period, Bussiere had been attempting to contact Roland Roberge, father of Carolyn, to inform him of his interest, being unaware that the bank's attorney had done so. On July 21, 1994, at her father's request, Carolyn returned a telephone call to Bussiere. Feld was present during the call which was on a speaker phone with Bussiere's consent. The call was taped without the knowledge or consent of Bussiere. Bussiere said that it had come to his attention that someone in the Roberge family was interested in 55 North River Road, and he wanted to suggest that they could have their attorney call because there were a number of documents that they may want to read and receive copies of from him. On July 28, 1994, and again on September 1, 1994,

Bussiere faxed and mailed the documents to Carolyn Roberge, restating his claims. Feld acknowledged receipt of the September letter by his letter of September 2.

Corporations were formed in August 1994 to own the mortgage and to manage the building, 55 Associates and HT Management Services. September 7, 1994, 55 Associates purchased the first mortgage which was then held by Ali Inc., a subsidiary of Lehman Brothers. Shares in 55 Associates had been issued to Carolyn, her mother Sheila, and her brother John's trust. Carolyn and Sheila were the directors and Roland Roberge held no office or stock.

In April 1995, Feld initiated eviction proceedings, later followed by demand and notice seeking to end the Bussiere leasehold, believing it was terminable at will, or effective year to year. Thereafter, Bussiere instituted an equity proceeding in Superior Court, quickly followed by discovery and other pleadings targeted at finding out what the Roberges knew of the 1984 agreements between Bussiere and the bank, and the role of Roland Roberge in acquiring the building.

The action went to trial in February 1996 with a mistrial being declared on the third day of trial following the offer into evidence of the July 21, 1994 tape and withdrawal of counsel. *Allegation of violation of Rule 8.4(c) by making a tape of a telephone conversation without permission of a party to the conversation and offering it at trial without prior notice for the purpose of gaining an unfair advantage against their opponent.*

The taping of the phone call with Emile Bussiere on July 21, 1994, without his knowledge or consent, and its offer for use at trial appears to have violated RSA 570-A:2, 6. The taping was done by Carolyn Roberge who requested

Steven Feld to be with her while the call was made. Carolyn had earlier been warned by Graham Kilvert of Structured Assets (Lehman Brothers) that Bussiere had threatened others who were interested in the 55 North River Road property and that she should expect this from him. This reportedly frightened Carolyn so she decided to record the telephone conversation. Attorney Feld advised Carolyn that making the recording was legal based on earlier review of the law by Feld. The conversation was on speaker phone which was made known to Bussiere along with the fact that Feld was present. The conversation was very brief with Carolyn reciting that she was returning Bussiere's earlier calls and with Bussiere stating that he had called her father Roland to inform him of the existence of documents and that he would make them available. The circumstances presented no expectation of privacy certainly with regard to this conversation. Neither Feld nor Carolyn were aware of RSA 570-A when the taping occurred or when the tape was offered at trial. When the statute was brought to their attention by the trial court, Feld sought to withdraw the tape as an exhibit, while Bussiere pressed for its admission, seeing that any advantage to be gained favored his cause of showing notice and knowledge of the 1984 unrecorded documents. The conversation revealed no purpose or intent on the part of Carolyn or Feld to obtain an unfair advantage, but only to respond to Bussiere's calls. It has not been shown by clear and convincing evidence that either Feld or Carolyn Roberge violated Rule 8.4(c) by engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation in recording the speaker phone conversation or its offer at trial.

Carolyn Roberge – Allegations that Rules 3.4(a) and 3.4(d) were violated by giving false, unresponsive, evasive, and misleading answers to interrogatories and questions at depositions concerning the receipt of, and knowledge of, 1984 non-recorded letters and agreements; and Rule 3.4(b) by continually failing to correct the record when she knew that sworn trial and deposition testimony given by her father concerning his role in, and what and when he knew of his daughter's and his wife's investment was inaccurate; and Rule 8.4(a) by violating rules of professional conduct.

The memorandum of the Professional Conduct Committee dated May 22, 1998, and the pretrial statement and legal memo dated April 24, 1998, submitted on behalf of Carolyn Roberge deal at length with those answers given by Carolyn Roberge which were claimed to be false, unresponsive, evasive, and misleading concerning receipt of, and knowledge of, unrecorded letters and agreements, as well as what testimony of her father she should have corrected. As noted in the PCC memorandum, the respondent's detailed memorandum (including the pretrial statement) goes through various individual claimed instances of false, evasive, and misleading testimony, and shows how each one is arguably true. It is evident that acknowledgement of the existence of the unrecorded letters and documents could have occurred before the closing on September 7, 1994, as a result of Bussiere's letter in July following his phone calls to the Roberge family. In any event, with the initiating of the verified petition and commencing with the answer to the petition, it should have been clear that the 1984 non-recorded letters and agreements were acknowledged and that notice would not be a defense. (*See* pretrial statement, pp. 10-30.) The Roland Roberge testimony is reviewed in the pretrial

statement beginning on page 31 and specifically as to his deposition answers concerning Roland's participation, or lack thereof, in the purchase of the mortgage beginning on page 40. But for the ill will existing between Roland Roberge and Emile Bussiere, at least throughout the period of acquisition and this litigation, it may be that more prompt and responsive answers would have resulted showing that Roland raised and provided the funds to enable his wife and daughter to acquire the building. The answers provided certainly showed that Roland Roberge would not own the building; that it was to be the business of his wife and daughter, even though he assisted them through the process. Based on all the evidence including the memoranda alluded to, it is the opinion of the referee that the clear and convincing standard has not been met with regard to showing violations by Carolyn Roberge.

In addition, by motion to dismiss and within requests filed, it is claimed that 3.4 Rules do not apply to Carolyn Roberge in her non-lawyer capacity presented here; she was a client and a witness and not an advocate. Rule 3.4 spells out conduct which a lawyer in representing a client may not use. As noted, it has not been alleged that Carolyn's answers or her failure to correct her father's testimony constituted "intentional misrepresentation" which could subject an attorney to discipline even when occurring in a personal matter. *Astles' Case*, 134 N.H. 602 (1991). It is the opinion of the referee that the motion to dismiss claims under Rule 3.4 is with merit and should be granted.

Steven E. Feld – Allegations that Feld violated Rules 3.4(b), 3.4(c), and 3.4(d) by engaging in conduct that shows a calculated intention to distort the record by orchestrating, assisting, counseling, and tolerating the formulation of inaccurate and incomplete sworn responses that he knew were inaccurate.

It is claimed that as counsel of record during litigation and earlier as counsel during the purchase period, Feld was aware of the importance of the 1984 correspondence and unrecorded documents that he had received and reviewed before closing, but throughout the pretrial period evaded acknowledging the timely receipt of these documents. As previously stated, such acknowledgement did not occur before the purchase closing on September 7, 1994. Again, it is found that acknowledgement did occur with the advent of litigation. The answer to the Bussiere Verified Petition admitted to the 1984 unrecorded letters and agreements, although contesting their meaning and validity. (*See* Roberge exhibit E and C; Roberge pretrial statement, pp. 11-19.) The pleading responses by way of answers and admissions while acknowledging the existence and claims set forth by the documents, sought to preserve the right to question the legal effect of documents, their genuineness, and whether they had been properly authorized. Thereafter, in response to summary judgment filings, Attorney Bussiere asserted that existence of the unrecorded documents and agreements had been admitted by the Roberges and corporate defendants. The alleged evasive acknowledgement of the unrecorded documents and agreement has not been shown by clear and convincing evidence.

During the discovery phase of litigation, it is clear that Attorney Feld "watched and listened to his clients

(Roberge) testify to facts and circumstances that he knew to be inaccurate" as argued by committee counsel John Griffith. When Attorney Bussiere sought in deposition to determine whether Roland Roberge was involved financially in acquiring the 55 North River Road first mortgage, a non-response resulted as a result of an objection offered by Feld which obviously went beyond any court-ordered protection arising out of an earlier representation by Mr. Roberge by Attorney Bussiere. Subsequently, when this same area was pursued through interrogatories, a further non-response resulted with Feld and Mr. Roberge declaring that the information was outside Mr. Roberge's personal knowledge. (*See* PCC exhibits #3 and #10.) It was evident at trial and certainly at the hearing before the referee, that the financial circumstances of the Roberge family was only known by Mr. Roberge and that it was Mr. Roberge who arranged for the release of funds to his wife to enable Mrs. Roberge and Carolyn to acquire the first mortgage. This inaccuracy was allowed to persist without correction throughout the pretrial period.

Another example offered to illustrate the failure of Attorney Feld to correct the record concerning Carolyn Roberge's response to requests for admissions where in the request was to admit the Bussiere letter of July 28, 1994, which enclosed copies of the unrecorded document and agreement. Receipt of this letter was denied. Carolyn's lack of memory of this can be excused, but not that of Attorney Feld. (*See* PCC exhibit 7.) Attorney Feld held in his hands, and reviewed with Carolyn, the July 28th letter, as well as Attorney Solomon's letter, enclosing copies of the 1984 unrecorded documents and agreements. This occurred well before the closing. Such failure to

correct the record presents clear and convincing evidence of Rule 3.4 violations.

Mitigation resulted during the first trial and subsequently when correction of inaccuracies occurred so that the real and relevant issues were litigated, i.e., concerning the validity of the Bussiere lease and the extent of any interest presented.

Further findings of fact and rulings appear in response to the parties' requests. The referee's findings and rulings and those made in response to requests and memoranda filed have been made as a result of a four-day trial and observations made at that time including exhibits and review of the almost one-thousand-page transcript. It is the opinion of the referee that the appropriate sanction of Attorney Feld in this case is public reprimand. It has been asserted that no prior disciplinary record exists. No dishonest motive has been shown, and it appears that during the first trial good faith efforts were made to correct any inaccuracy. Counsel has asserted that Attorney Feld cooperated with the professional conduct committee throughout its proceedings and that Attorney Feld has expressed regret that he allowed himself to get caught up in the battlefield atmosphere in the underlying litigation. Even Mr. Bussiere expressed his own conduct as that of "fighting fire with fire." With the finding of Rule 3.4 violations above, it is found that Attorney Feld violated Rule 8.4(a) by engaging in conduct that violated the rules of professional conduct.

It is recommended that the respondent Feld be ordered to reimburse the committee for its expenses in investigating and prosecuting this case as it pertains to

Attorney Feld and in an amount recognizing that he has prevailed in part.

The motion to dismiss claims under Rule 3.4 concerning respondent Carolyn Roberge in case No. LD-97-008 is granted.

The following rulings are made on respondent Carolyn M. Roberge's *requests for findings of fact and rulings of law*:

Findings:

1 and 2 are granted (*see* decision and ruling on motion to dismiss);

3, 4, and 5 are granted;

6, 7, and 8 are granted (see decision re Rule 8.4(c) and the recording of the speaker phone conversation); **Findings 9 through 14 are granted.**

Rulings:

1 is granted;

2 is granted, as to testimony apparently presented at trial (the referee only received and reviewed a partial first trial transcript relating to the tape issue) and at the hearing before the referee. The deposition testimony gave the appearance of truthfulness, but was not complete, an example being Mr. Roberge's responses to questions seeking to show his financial contribution toward acquiring the first mortgage;

3 is granted;

4 and 5 are granted, insofar as they are consistent with the referee's decision;

6 is granted, but it is recognized as noted that personal conduct under appropriate circumstances can result in sanction application;

7 and 8 are granted, consistent with the referee's remarks above (6) and as noted within this decision;

9 through 11 are granted, except that the referee has not seen or read the comments of Justice Lynn other than as they are reported in request No. 10; the referee agrees with these remarks by Justice Lynn;

12 is granted, in that Carolyn was a party at the first trial and the tape was offered into evidence by her trial counsel, Attorneys Miller and Feld;

13 and 14 are granted;

15 is denied; in the event Carolyn Roberge had been found to have violated provisions of Rule 3.4 or 8.4, such conduct would have been the basis to present a violation of Rule 8.4(a);

16 through 21 are granted, except the blame for the battlefield atmosphere of the litigation rests equally with counsel for both sides and with the Roberges.

The following rulings are made on respondent *Steven E. Feld's requests for findings of fact and rulings of law*:

1 and 2 are granted; no showing of prior disciplinary proceeding concerning Feld has been presented;

3 through 8 are granted;

9 through 19 are granted;

20 is denied, in that upon observing that Carolyn Roberge was preparing to and did tape the phone conversation, it is difficult to believe that Feld would

say nothing to Ms. Roberge or she to him, concerning the taping;

21 is granted, as consistent with the hearing testimony.

22 is denied, only because the referee received no evidence as to why the tape was offered into evidence;

23 and 24 are granted, as consistent with hearing evidence;

25 is denied, in that it appears that there was a violation of RSA 570-A:6, but not a showing by convincing clarity that 8.4(c) was violated by the recording and offering the tape into evidence;

26 through 29 are granted;

30 through 39 are granted;

40 is granted in part; however, evidence regarding whether Attorney Bussiere obtained confidential financial information remained debatable;

41 and 42 are granted;

43 is granted, only in so far as the complaint was based upon Mr. Roberge's *belief* that a conflict existed;

44 through 65 are granted, as consistent with evidence presented at this hearing, except as to the last phrase concerning Mr. Roberge;

66 is denied;

67 is granted;

68 is granted;

69 is granted in part, consistent with this decision;

70 is denied;

71 is granted;

72 and 73 are denied;

74 is denied;

75, 76, and 77 are denied;

78 through 83 are granted;

84 is granted, with the additional fact that the court did not find the attachments (the 1984 unrecorded documents and agreements) to be protected by privilege;

85 through 87 are granted;

88 through 92 are granted;

93 is granted;

94 is granted, except as to conduct in violation of Rule 3.4;

95 is granted;

96 is granted, except as to conduct found to be in violation of Rule 3.4;

97 and 98 are granted;

99 through 103 are denied to the extent they are contrary to this decision;

104 through 108 are granted;

109 through 116, concerning mitigating factors are granted, as representing considerations that are important in determining whether violations have occurred, and if so, what are the appropriate sanctions to impose;

117 is granted; and

118 is granted in part, denied in part.

Date: July 16, 1998

Respectfully submitted,

/s/ Robert H. Temple
Honorable Robert H. Temple,
Referee

THE STATE OF NEW HAMPSHIRE
SUPREME COURT

CASE NO. LD-97-009

In the matters of Steven E. Feld

Judicial Referee's Recommendation on Respondent's Motion for Leave to File Motion to Vacate, and Committee's Objection thereto.

The respondent Feld by this motion seeks leave to File a motion to vacate the public censure ordered by the Supreme Court on August 30, 1999, saying that because of the testimony contained in the Report of the Attorney General on W. Stephen Thayer, III and New Hampshire House and Senate impeachment hearings, the respondent has the ability to show that the Court's deliberations surrounding his public censure were improper and contrary to the elements of fairness and justice required by the Court, resulting in a tainted proceeding requiring that his public censure be vacated. The Committee's objection claims no precedent exists in favor of Feld's argument that as a result of the deliberations the matter is so tainted that the order of public censure must be vacated, saying that only the justices themselves would be able to make such a determination and they have already testified that they were not influenced by the attempted influence on the part of Stephen Thayer, III.

Inasmuch as the actions of Thayer, attempting to influence *Feld's Case*, and Chief Justice Brock's reported efforts to keep Thayer's misconduct "in house", places in issue whether a responsible person would question the impartiality of the Court, it appears appropriate to allow the respondent Leave to file a motion to vacate to allow determination of this issue as raised and as limited by the

present motion seeking leave to file. *Blaisdell v. City of Rochester, 135 N.H. 589 (1992), Wehringer's Case, 130 N.H. 707 (1988), Snow's Case, 140 N.H. 618 (1996).*

The respondent Feld claims in his memoranda that Attorney Stephen L. Tober's representation of Justice Broderick before the House and Senate investigation and Hearings on Chief Justice Brock, after Tober had represented Feld before the Referee and Court in *Feld's Case*, was improper and in violation of Professional Conduct Rule 1.9, Conflict of Interest: Former Client. Whether this claim has merit is an issue for another forum and represents alleged conduct that took place more than a year subsequent to the Court's deliberations on the Feld Case. The Referee does not find that Attorney Tober's representation of Justice Broderick at the stage and time of its occurrence is relevant to the propriety of Court conduct in August 1999. The Referee determines that evidence concerning Attorney Tober's representation of Justice Broderick in the investigation and impeachment hearing shall not be admitted on the present issues.

Additionally, Feld memorandum dated May 24, 2001, raises for the first time, claimed error by the Referee and the Supreme Court in applying New Hampshire Professional Conduct Rule 3.4 (b-d) violations against Feld argueing [sic] that the Referee and the Court (*Feld Case*, LD97-009, decided by the Supreme Court August 30, 1999) ruled that the respondent failed to perform an affirmative duty to disclose a client's misstatements and this ruling redefined a lawyer's obligation under Rule 3.4, without prior notice, in violation of due process of law. This claim should have been raised before the Referee and the Supreme Court, as noted by Committee counsel. This alleged error has not been brought up in a timely manner and will

not be considered with present issues. *State v. Sterndale, 139 N.H. 445.448 (1995).*

Accordingly, it is recommended that this court grant the respondent's motion for Leave to file a motion to vacate, limiting claims and evidence to those contained in the motion for leave to file, thus excluding reference to the Tober representation claim and claimed Rule 3.4 error.

No recommendation is made on the materials and arguments submitted concerning reimbursement of fees and expenses in view of the pendency of outstanding issues, which may or may not be dispositive of fee and expenses issues.

Date: 7/9/01

Respectfully Submitted,

/s/ Robert H. Temple
Robert H. Temple, Referee

THE STATE OF NEW HAMPSHIRE

SUPREME COURT

In Case No. LD-97-009, *In the Matter of Steven E. Feld*, the court on July 26, 2001, made the following order:

A copy of the referee's recommendation on respondent's motion for leave to file motion to vacate shall be transmitted to the parties with this order.

The recommendation of the referee is accepted. Accordingly, respondent's motion for leave to file a motion to vacate is granted to the extent and is limited by the referee in his report. Respondent's motion to vacate must be filed on or before August 29, 2001. Any objection to the motion must be filed by September 28, 2001.

Nadeau, Dalianis, and Duggan, JJ., concurred.

Howard J. Zibel,
Clerk

Date of clerk's notice of decision: July 30, 2001

Distribution:

James L. DeHart, Esquire
Robert C. Varney, Esquire
Steven E. Feld, Esquire
John P. Griffith, Esquire
Honorable Robert H. Temple
John M. Edwards, Esquire
Arnold R. Rosenfeld, Esquire
File

818 A.2d 292

Supreme Court of New Hampshire.

In the Matter of Steven E. **FELD**, Esquire.

No. LD-97-009.

Dec. 4, 2001.

Respondent's motion to vacate is granted in part and denied in part. Respondent's request to vacate the report of the referee is denied. The opinion issued by the Supreme Court on August 30, 1999, 144 N.H. 131, 737 A.2d 656, is vacated. The parties may file new briefs, and the case will be scheduled for reargument when briefing has been completed.

The professional conduct committee may file a brief on or before January 25, 2002; the respondent may file a brief on or before March 11, 2002.

NADEAU, DALIANIS, and DUGGAN, JJ., concurred.

THE STATE OF NEW HAMPSHIRE

SUPREME COURT

In Case No. LD-97-009, *In the Matter of Steven E. Feld*, the court on February 12, 2003, issued the following order:

Motion for reconsideration is denied. We note that respondent, in support of his motion, states that "In recognition of the fact that he was the victim of judicial misconduct, the Court vacated Feld's original public censure. . . . " This statement is not correct because we did not recognize that the respondent was a victim of judicial misconduct in either our opinion on our December 4, 2001 order vacating the 1999 opinion.

Motion for reconsideration denied.

Nadeau and Duggan, JJ., concurred; Murphy, C.J., and Smith, J., superior court justices, specially assigned under RSA 490:3, concurred.

Eileen Fox,
Clerk

Distribution:
Professional Conduct Committee
James L. DeHart, Administrator
Arnold R. Rosenfeld, Esquire
John P. Griffith, Esquire
John M. Edwards, Esquire
Keith Long, Esquire
Steven E. Feld, Esquire
Honorable Walter L. Murphy
Honorable Robert Temple
Honorable Peter W. Smith

Laura Mitchell, Supreme Court
File